170

(2)

No. 10-134

Supreme Court, U.S.
FILED
AUG 26 2010
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

GUADALUPE MORALES,

Petitioner,

v.

ODYSSEY HEALTHCARE, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

BRIEF IN OPPOSITION

GERARD THOMAS FAZIO
OWEN & FAZIO, P.C.
10440 N. Central Expressway
Suite 1450
Dallas, Texas 75231
(214) 891-5960
jfazio@owenfazio.com

Counsel for Respondents

231992

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

	Page
TABLE OF CITED AUTHORITIES	ii
INTRODUCTION	1
RESPONDENTS' OBJECTION TO PETITIONER'S STATEMENT OF FACTS	2
STATEMENT OF FACTS	3
THE ARBITRATION AGREEMENT SPECIFIES THAT THE FEDERAL ARBITRATION ACT WILL GOVERN THE INTERPRETATION, ENFORCEMENT AND PROCEEDINGS UNDER THE ARBITRATION REQUIREMENT	6
THE FEDERAL ARBITRATION ACT AS APPLIED DOES NOT VIOLATE THE 10TH AMENDMENT OF THE UNITED STATES CONSTITUTION	8
CONCLUSION	12

TABLE OF CITED AUTHORITIES

Page

Cases

Allied-Bruce Terminix Cos. v. Dobson,
513 U.S. 265, 130 L.Ed. 2d 753, 115 S. Ct. 834 ..... 7, 8

In re Autotainment Partnership,
183 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2006, pet. granted) 6, 7

In re Big 8 Food Stores, Ltd.,
166 S.W.3d 869 (Tex. App.—El Paso 2005, orig proc.) 10

Circuit City Stores, Inc. v. Saint Clair Adams,
532 U.S. 105, 121 S. Ct. 1302, 194 L.Ed.2d 234 (U.S. 2001) 7

City of LaPorte v. Barfield,
898 S.W.2d 288, 293 (Tex. 1995) 11

In re Golden Peanut Co., LLC,
298 S.W.2d 629, 631 (Tex. 2009) 10

Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.,
452 U.S. 264, 288 (1981) 2, 8, 9, 11

In re Kellogg Brown & Root,
80 S.W.3d 611, 617 (Tex.App.—Houston [1st Dist.] 2002, orig. proceeding) 6

Cited Authorities

	Page
Lost Creek Util. v. Travis Indus. Painters, 827 S.W.2d 103, 105 (Tex.App.—Austin 1992, writ denied)	7
In re Poly-America, L.P., 262 S.W.3d 337, 357 (Tex. 2008)	9
Ruiz v. Miller Curtain Co., Inc., 702 S.W.2d 183, 185 (Tex. 1985)	9
Southland Corp. v. Keating, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984)	7, 8
Teel v. Beldon Roofing & Remodeling Co., 281 S.W.3d 446, 449 (Tex.App.—San Antonio 2007, pet. denied)	6
The Tex. Mex. Ry. Co. v. Bouchet, 963 S.W.2d 52 (Tex. 1998)	11
White-Weld & Company v. Mosser, 587 S.W.2d 485, 487 (Tex. Civ.App.—Dallas 1979, writ ref's n.r.e.)	1, 6

Cited Authorities

Page

United States Constitution

Tenth Amendment 1, 8, 10, 11

Statute

9 U.S.C. § 2 (1999) 1, 7

Rule

Sup. Ct. R. 10 1

INTRODUCTION

Petitioner has presented no "compelling reasons" for their Petition for a Writ of Certiorari to be granted ("Petition"). *See* Sup. Ct. R. 10. More specifically, Petitioner has failed to demonstrate that the Texas Supreme Court erroneously granted Respondents' Petition for Writ of Mandamus by finding that the Federal Arbitration Act does not violate the Tenth Amendment of the United States Constitution. Accordingly, the Petition should be denied.

Petitioner initially asserts that Congress never intended the Federal Arbitration Act to eviscerate or preempt a state's workers compensation scheme. This argument is wholly without merit because the arbitration agreement in question specifically identifies that the Federal Arbitration Act (FAA) will govern the interpretation, enforcement and proceedings under the arbitration requirement. Furthermore, the arbitration agreement in question involves the creation of an employment relationship involving "interstate commerce" and this is a sufficient transaction to fall within section two of the Federal Arbitration Act (FAA). *See* 9 U.S.C. § 2 (1999); *White-Weld & Company v. Mosser*, 587 S.W.2d 485, 487 (Tex. Civ.App.—Dallas 1979, writ ref's n.r.e.).

Petitioner also asserts that Federal Arbitration Act as applied violates the Tenth Amendment of the United States Constitution. Despite this argument, the Texas Supreme Court has clearly determined that Federal Arbitration Act does not violate the Tenth Amendment with regard to Texas's Workers' Compensation Act.

More specifically, the Texas Supreme Court has determined that the Federal Arbitration Act doe not directly impair Texas's ability to structure integral operations in areas of traditional government functions. *See Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.* 452 U.S. 264, 288 (1981).

Outside of the assertions raised by Petitioner, Petitioner and Respondents agreed that the Federal Arbitration Act is applicable and Petitioner has not brought forth any evidence or claims of fraud or duress. Accordingly, the Court does not need to address the federal preemption issue or whether the Federal Arbitration Act is applicable.

Based on the forgoing, Petitioner has failed to satisfy her burden of proof that there are any compelling reasons for the Court to grant her Petition. As such, the Petition should be denied.

RESPONDENTS' OBJECTION TO PETITIONER'S STATEMENT OF FACTS

Respondents object to Petitioner's Statement of Facts because it mischaracterizes the arbitration agreement in question. More specifically, Petitioner mischaracterizes that the arbitration agreement and/or "Plan" forced injured hourly wage employees, like Petitioner, to arbitrate her claims in Dallas, Texas, more than 500 miles from the place of the incident in El Paso, Texas at her own expense. Petitioner further mischaracterizes that the arbitration agreement and/

or "Plan" required Petitioner to have a company representative accompany her to all doctors visits during the course of her medical treatment in order to receive medical benefits.

STATEMENT OF FACTS

On August 30, 2005, Petitioner, Guadalupe Morales, signed a Receipt, Safety Pledge, and Arbitration Acknowledgement. According to this document, Petitioner acknowledged that she had received and read (or had the opportunity to read) the Summary Plan Description (the "SPD") for the Odyssey HealthCare Occupational Injury Benefit Plan, effective August 1, 2004. Furthermore, Petitioner acknowledged that the SPD included a mandatory company requiring that certain claims or disputes relating to an on-the-job injury (that cannot otherwise be resolved between the Company and Petitioner) must be submitted to an arbitrator, rather than a judge and jury.

Under the Section entitled Arbitration of Certain Injury-Related Disputes of the Summary Plan Description, Subsection Interstate Commerce, states "[t]he Company is engaged in transactions involving interstate commerce (for example providing services to patients from other states) and your employment involves such commerce. The Federal Arbitration Act will govern the interpretation, enforcement, and proceedings under this arbitration agreement."

Furthermore, Subsection Arbitration Procedures provides

> [a]ny arbitration under this arbitration requirement will be administered by the American Arbitration Association ("AAA") under its then current Employment Arbitration Rules and Mediation Procedures. Unless otherwise agreed to in writing by the parties, the arbitrator selected by the parties in accordance with those rules (1) shall be an attorney licensed to practice in the State of Texas with experience in personal injury litigation, and (2) shall be selected from a panel of arbitrators located in Dallas County, Texas. Thus, the Arbitration Procedures do not require the arbitration to take place in Dallas, Texas. Rather the Arbitration Procedures only require that the arbitrator be selected from a panel of arbitrators located in Dallas, Texas. Additionally, Respondent Odyssey Healthcare, Inc. would cover the cost with the arbitrator's travel expense so Petitioner would not incur any additional cost or burden.

Lastly, Subsection Interstate Commerce identifies that "[t]he company is engaged in transactions involving interstate commerce (for example providing services to patients from other states) and you employment involves such commerce. The Federal Arbitration Act will govern the interpretation, enforcement, and proceedings under this arbitration requirement."

Despite a valid arbitration agreement between Respondent Odyssey Healthcare, Inc. and Petitioner Guadalupe Morales, Petitioner filed a lawsuit in the County Court at Law No. 5 in El Paso, El Paso County, Texas for alleged work related injuries. Since Petitioner failed to agree to transfer the case to arbitration, Respondents were forced to file a motion to compel arbitration. The trial court denied Respondents' motion and Respondents appealed the trial court's decision with a Petition for Writ of Mandamus to the Eighth Court of Appeals, El Paso, Texas. The Eighth Court of Appeals, issued a Memorandum Opinion that Respondents were not entitled to mandamus relief.

Following Respondents Odyssey Healthcare, Inc. and George Portillo's appeal to the Texas Supreme Court, the Texas Supreme Court concluded that the arbitration clause at issue was valid and enforceable and that the trial court abused its discretion by failing to grant Respondents' motion to compel arbitration. As such, the Texas Supreme Court directed the trial court to vacate its prior order and grant Respondents' Motion to Compel Arbitration. Petitioner now seeks relief from this ruling.

THE ARBITRATION AGREEMENT SPECIFIES THAT THE FEDERAL ARBITRATION ACT WILL GOVERN THE INTERPRETATION, ENFORCEMENT AND PROCEEDINGS UNDER THE ARBITRATION REQUIREMENT

The Court should uphold that that the Federal Arbitration Agreement applies to this state court proceeding. The basis for this holding is that the arbitration agreement in question specifically identifies that the Federal Arbitration Act (FAA) will govern the interpretation, enforcement and proceedings under the arbitration requirement.

If an agreement requires arbitration under the FAA, a party can be compelled to arbitrate under the FAA regardless of whether the transaction involved or affected interstate commerce. *Teel v. Beldon Roofing & Remodeling Co.*, 281 S.W.3d 446, 449 (Tex.App.—San Antonio 2007, pet. denied); *In re Kellogg Brown & Root*, 80 S.W.3d 611, 617 (Tex.App.—Houston [1st Dist.] 2002, orig. proceeding). Since this agreement calls for the application of the FAA, this alone is sufficient to invoke the FAA. *In re Autotainment Partnership*, 183 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2006, pet. granted).

Moreover, Texas courts have held that the "creation of an employment relationship" involving interstate commerce is a "sufficient transaction" to fall within section two of the Federal Arbitration Act (FAA). 9 U.S.C. § 2 (1999); *White-Weld & Company v. Mosser*, 587 S.W.2d 485, 487 (Tex. Civ.App.—Dallas 1979, writ ref's n.r.e.). Under the FAA the term "commerce" is to

be broadly construed. *Lost Creek Util. v. Travis Indus. Painters*, 827 S.W.2d 103, 105 (Tex.App.—Austin 1992, writ denied). Therefore, if the transaction relates to interstate commerce, the FAA is implicated. *Id.*

In applying these standards to this case, the arbitration agreement in question specifically calls for the application of the FAA. As previously mentioned, this alone is sufficient to invoke the FAA. *In re Autotainment Partnership*, 183 S.W.3d 532 (Tex. App.—Houston [14th Dist.] 2006, pet. granted). Additionally, the arbitration agreement in question specifically identifies that Respondent Odyssey Healthcare, Inc. is engaged in transactions involving interstate commerce and that Petitioner's employment involves interstate commerce. As such, this is a "sufficient transaction" to fall within section two of the Federal Arbitration Act (FAA). 9 U.S.C. § 2 (1999); *White-Weld & Company v. Mosser*, 587 S.W.2d 485, 487 (Tex. Civ.App.—Dallas 1979, writ ref's n.r.e.).

In support of her position, Petitioner argues that the Court should overturn *Southland Corp. v. Keating*, 465 U.S. 1, 79 L. Ed. 2d 1, 104 S. Ct. 852 (1984). This argument is wholly without merit. As the Court indicated in *Circuit City Stores, Inc. v. Saint Clair Adams*, 532 U.S. 105, 121 S. Ct. 1302, 194 L.Ed.2d 234 (U.S. 2001), the question of *Southland's* continuing vitality was given explicit consideration in *Allied-Bruce*,[1] and the Court

---

[1] *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 130 L.Ed. 2d 753, 115 S. Ct. 834 (the Court interpreted Section 2 of the Federal Arbitration Act "involving commerce" phrase as implementing Congress' intent to exercise (its) commerce power to the full. *Id.* at 277, Pg. 3-5.

declined to overrule rule it. *Id.* at 1313. Furthermore, the Court noted that Congress had not moved to overturn *Southland* and we note that it has not done so in response to *Allied-Bruce* itself. *Id.* Petitioner has not provided any additional facts to support the Court to consider this matter. Accordingly, the Court should uphold that the arbitration agreement in this matter applies to this state court proceeding.

THE FEDERAL ARBITRATION ACT AS APPLIED DOES NOT VIOLATE THE 10TH AMENDMENT OF THE UNITED STATES CONSTITUTION

The Federal Arbitration Act does not violate the 10th Amendment of the United States Constitution. The Court has stated that there are three requirements to show that a statute violates the 10th Amendment: 1) a showing that the challenged statute regulates the states as states; 2) the federal regulation must address matters that are indisputable attributes of state sovereignty; and 3) it must be apparent that the states' compliance with federal law would directly impair their ability to structure integral operations in areas of traditional government functions. *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981). Even if all three are met, there are situations in which the nature of the federal interest advanced may be such that it justifies state submission. *Id.* at 288 n. 29.

In applying this standard to this case, the Texas Supreme Court recognized that a state has a Tenth Amendment power to enact and regulate its own workers' compensation system, protecting workers'

claims against employers. *Ruiz v. Miller Curtain Co., Inc.*, 702 S.W.2d 183, 185 (Tex. 1985). The Texas Supreme Court further recognized that statutory claims under the Texas Workers' Compensation Act are arbitrable. *In re Poly-America, L.P.*, 262 S.W.3d 337, 357 (Tex. 2008) (An arbitration agreement covering statutory claims [including workers' compensation claims] is valid so long as the arbitration agreement does not waive substantive rights and remedies of the statute and the arbitration procedures are fair so that the employee may effectively vindicate his statutory rights). Accordingly, the Texas Supreme Court concluded that compliance with the Federal Arbitration Act would not "directly impair" Texas's ability to structure integral operations in areas of traditional government functions. *Hodel*, 452 U.S. 228.

Clearly, the Texas Supreme Court recognized that the arbitration agreement in question did not waive any of Petitioner's substantive rights and remedies pursuant to the Texas Workers' Compensation Statute and concluded that the arbitration procedures were fair to the Petitioner so that she is able to vindicate her statutory rights. Petitioner has not identified any rights or remedies, other than claiming an absolute bar to arbitration, that the arbitration agreement in question and FAA is waiving. In other words, the FAA and the arbitration agreement still allow employees to receive medical and indemnity benefits pursuant to the ERISA Plan. Furthermore, the FAA and the arbitration agreement are not waiving Petitioner's right to enforce ERISA plan through arbitration. As the El Paso Court

of Appeals determined in *In re Big 8 Food Stores, Ltd.*, 166 S.W.3d 869 (Tex. App.—El Paso 2005, orig proc.):

> It has been accordingly said that almost without limitation, or the parties agree is valid, the parties are bound by the agreement they have made, and the fact that a burden is a hard one does not entitle the party to be relieved therefrom if he assumed it fairly and voluntarily. A contract is not unenforceable on the grounds that it yields a return misfortunate to the signatories in time and money where there has been no mistake or unfairness in the party against whom it is sought to be enforced has received and enjoyed the benefits. *Id.* at 878.

Furthermore, as the Texas Supreme Court correctly pointed out in *In re Golden Peanut Co., LLC*, 298 S.W.2d 629, 631 (Tex. 2009) (per curiam) an agreement to arbitrate is a waiver of neither a cause of action nor the rights provided under section 406.033(a), but rather an agreement that those claims should be tried in a specific forum. *Id.* Clearly, the Texas Supreme Court understands that the arbitration agreement does not waive any rights and/or violate the 10th Amendment of the United States Constitution. Rather, the Texas Supreme Court recognized that an agreement to arbitrate is a forum provision that allows employees, including Petitioner, to adjudicate their rights. Thus, the FAA does not violate the 10th Amendment of the United States Constitution.

Similarly, in *The Tex. Mex. Ry. Co. v. Bouchet*, 963 S.W.2d 52 (Tex. 1998), the Texas Supreme Court determined that a nonsubscriber to the Texas Workers' Compensation Act, could not assert a claim under article 8307c and/or a Section 451.001 of the Texas Labor Code. In other words, the Texas Supreme Court found that to a retaliation claim is intended to apply only to employees and employers who act under the Texas Workers' Compensation Act. *Id.* at 56. The Texas Supreme Court further found that this conclusion is consistent with our statement in *City of LaPorte v. Barfield*, 898 S.W.2d 288, 293 (Tex. 1995), "[f]orbidding retaliation against an employee for seeking monetary benefits under the Worker's Compensation Law presupposes that an employer is a subscriber." *Id.* As such, this holding is consistent with the finding that the FAA would not directly impair the state's ability to structure integral operations in areas of traditional government functions.

Even presuming that all three requirements of *Hodel* show that the FAA violates the 10th Amendment of the United States Constitution, the nature of the federal advanced justifies state submission. More specifically, the Court should recognize that the federal interest is in protecting and enforcing transactions that involve interstate commerce, including the creation of employment relationships. If so, then the Court should uphold that the FAA does not violate the 10th Amendment of the United States Constitution.

CONCLUSION

The arbitration agreement in question specifies that the Federal Arbitration Act (FAA) will govern the interpretation, enforcement and proceedings under the arbitration requirement. As previously mentioned, the requirement alone is sufficient to invoke the FAA. Furthermore, the arbitration agreement in question involves the "creation of an employment relationship" involving interstate commerce and is a "sufficient transaction" to fall within section two of the Federal Arbitration Act (FAA). In other words, Petitioner's employment with Respondent Odyssey Healthcare, Inc. involves interstate commerce and invokes the FAA. Finally, the FAA does not violate the 10th Amendment of the United Stated Constitution because it does not waive any substantive rights or remedies pursuant to the Texas Workers' Compensation Act. For these reasons, Petitioner has not established any compelling reasons for this Court to grant the Petition. Respondents, therefore, respectfully request that the Petition be denied.

Respectfully submitted,

JERRY FAZIO
OWEN & FAZIO, P.C.
10440 N. Central Expressway
Suite 1450
Dallas, Texas 75231
(214) 891-5960
jfazio@owenfazio.com

Counsel for Respondents